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IN THE

Supreme Court of the United States

October Term, 1949

No. 225

THE ANDREW JERGENS COMPANY, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR CERTIORARI.

(Pages 1 to 17.)

BRIEF ACCOMPANYING PETITION.

(Pages 19 to 57.)

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IN THE

Supreme Court of the United States

October Term, 1949

No.....

THE ANDREW JERGENS COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition of The Andrew Jergens Company, a Corporation, for a Writ of Certiorari Directed to the Court of Appeals for the Ninth Circuit.

(Pages 1 to 17.)

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner hereby prays for a Writ of Certiorari directed to the Court of Appeals of the United States for the Ninth Circuit to review the decree of that Court entered on the 17th day of May, 1949 [Petition for Rehearing denied June 24, 1949; R. 578], enforcing the order of the National Labor Relations Board.

The Board's order made in February, 1948, relates to an asserted refusal to bargain with the General Warehousemen's Union (the Teamsters) in January, 1946, and requires Petitioner to bargain with the Teamsters and to refrain from unilaterally increasing wages. It is admitted that Petitioner bargained freely as to all issues of the contract other than union security.

Summary and Short Statement of the Matter Involved.

Petitioner has been ordered to bargain with a Union of which for two years none of its employees has been a member. The Court of Appeals has approved the action of the National Labor Relations Board by enforcing this order, when the Board assumed the existence of a continuous majority in the certified Union until the date of its order. [R. 110.] The fact is that no Union members were in Petitioner's employ, and the Board has so conceded in its brief before the Court of Appeals [R. 567] in response to Petitioner's motion to adduce such evidence. In this respect, the Board admittedly exercised no discretion as to whether its order would effectuate the policies of the Labor Management Relations Act.

The decree of enforcement is not conditioned upon compliance with Section 8 (a) (3) of the Act [29 U. S. C. A. 158 (a) (3)], and its scope extends far beyond the acts sought to be prohibited.

The Board and the Court of Appeals held that Petitioner has refused to bargain collectively as to union security, by failing to respond more promptly to a Union ultimatum reinforced by strike and boycott measures, and with respect to wages by following the national pattern of wage increases, a standard previously agreed upon with the Union.

The Court of Appeals reviewed the proceedings of the Board under the statutory provision in effect at the time of the hearing before the Trial Examiner, without regard to the strictures of the Administrative Procedure Act [5 U. S. C. A. §1001] and the Labor Management Relations Act, 1947 [29 U. S. C. A. § 141].

Summary of Facts.

These results have been accomplished in the following factual setting (all record references, with a few minor exceptions, are either to the findings of the Board or the decision of the lower Court):

Within two weeks after the Teamsters Union had been certified, the parties met and negotiated, on January 17, 1946. A contract presented by the Union's representative was compared and discussed, clause by clause, with a contract which had been drafted by Petitioner as a basis for their negotiations with a prior union. [R. 25.] There was no substantial disagreement as to any of the issues other than union security, but the Union objected to any final agreement on any issue until the union security question had been settled. [R. 25, 26, 31, 32, 33, 36, 105, 109, 562.] The union security clause was fully discussed. [R. 24-39.] Petitioner's representatives stated that they had no authority to agree upon any form of union security without taking it up with Petitioner. [R. 562.]

There was conflict in the testimony of one of the Union's witnesses, Attorney Stevenson, as to whether the Petitioner's representatives had said they had no authority to *negotiate* union security. At one point this witness stated, in accordance with the testimony of all other witnesses, that the position of the Petitioner's representatives was that they could not *agree* to union security without taking it up with Petitioner. [R. 288.] At another point in his testimony this same witness, however, testified that the Petitioner's representatives said that they had no authority to negotiate concerning union security, and this latter statement was apparently accepted by the Board. Similarly, the Union stated that it would have to sub-

mit any agreement on its part to its own membership. [R. 26.]

Petitioner requested that an outstanding War Labor Board order (18 W. L. R. 582) be modified by joint application in order to permit Petitioner to enter into a contract with the present Union and to grant the 5¢ wage increase therein provided for, retroactive to 1943. The Union took the position that the War Labor Board order was a nullity, that they would have nothing to do with it, and would not join in an application to modify the order. [R. 28.] Petitioner took the position that without a modification it could not safely enter into a union security contract or grant an increase without subjecting itself to a possible penalty of disallowance for tax purposes of the entire payroll for four years. [R. 41.] Such an order would not be modified unless the Union joined in the application to the War Labor Board.

During the week of February 11, 1946, the Union unilaterally fixed the deadline of Monday, February 18th, for Petitioner to agree to grant union security. [R. 37.] On February 15, 1946, Petitioner addressed a letter to the Union in which it restated its position that no action could be taken unless the War Labor Board order was disposed of by joint application and stated its willingness to continue negotiations as to the other provisions of the contract. [R. 38, 562.] On the morning of February 16th, prior to the receipt of Petitioner's letter, the Union placed a strike and boycott in effect. [R. 562, 342-3.] Except as later restrained by the California Court, the Union continued to utilize every weapon in its power, lawful and unlawful, to put Petitioner out of business. [R. 435-6.]

On July 1, 1946, Petitioner put into effect a new wage schedule with an increase of approximately 15¢. This increase was within the limits authorized by Presidential Decree and by orders of the War Labor Board settling various national disputes, which settlement the Union's representatives stated in the January meeting would be agreeable. [R. 30.]

1 Labor Arbitration Reports, CXL;
2 Labor Arbitration Reports, XXIX.

At the time of the increase, all negotiations had been suspended for five months, and Petitioner had received no reply to its letter of February 15, 1946.

The Union has never expressed at any time willingness to negotiate whether or not the contract should contain a union security clause, but, as stated and found by the Board and by the Court below, and conceded by the Board's brief, has only been willing to negotiate upon condition that Petitioner agree to a union security clause. [R. 36, 562.]

In February, 1948, the Board issued its order requiring Petitioner to bargain with the Teamsters' Union (as to union security) and to refrain from unilaterally increasing wages. [R. 111-113.]

Three and one-half years after the asserted refusal to bargain, the Court of Appeals has ruled that it will enforce the Board's order without modification, although it was conceded by the Board in response to Petitioner's motion to adduce additional evidence, that as of January 1, 1948, the Teamsters did not contain in its membership any employees of Petitioner, and the Court has accepted the Board's argument that this fact was immaterial and need not be considered by the Board in framing its order.

The Decision of the Lower Court.

The holding of the Court of Appeals is that Petitioner was properly ordered to bargain with respect to union security, which was "the single significant issue remaining between the parties" [Findings R. 109, R. 562]; that this order need not provide for an election as required by the Labor Management Relations Act [29 U. S. C. A. 158 (a) (3)]; that the delay of three and one-half years from the asserted refusal to bargain is immaterial; that the fact that the Board has given no consideration to change in circumstances or to the complete loss of membership on the part of the Union but on the contrary has erroneously assumed in issuing the order that the Union has retained its majority [R. 110], is immaterial; that as a matter of law Petitioner is responsible for the loss, under the established Board policy, without any such determination by the Board or any exercise of discretion by it.

The decision holds that a general wage increase granted after negotiations had been terminated and the strike had been in progress for five months was a refusal to bargain, although the increase granted was within the amount negotiated with the Union and the impasse had arisen solely with respect to union security.

The decision holds that the Board in making its order after the amendment of the Act [U. S. C. A. 160(b)] was not bound by the existing Act [R. 573]; the Court does not consider whether the statutory requirements have been complied with and does not review the findings of the

Board, but itself goes outside the findings and supplements them with findings of its own.

The decision exhibits an entirely new concept of collective bargaining, holding that the Union may require that discussions be suspended until Petitioner accedes to the ultimatum for union security; that a four weeks' delay in replying constituted refusal to bargain and that Petitioner's request that the parties seek a modification of the War Labor Board order that Petitioner enter into a union security agreement with a different Union was unreasonable; that the Union was justified in placing an arbitrary deadline for a reply to its ultimatum and in anticipating this deadline by peremptory strike and boycott action against Petitioner [R. 562, 37]; that the delay in answering the ultimatum for union security must be considered "in the light of the history of Petitioner's relations" with this prior Union, although there was no evidence in the record and no finding thereon, and the allegation of the complaint which would raise such issue was stricken at the opening of the hearing. [R. 565; Findings R. 20.]

Jurisdiction of This Court.

The jurisdiction of this Court arises under Section 10 (e) of the National Labor Relations Act (Act of July 5, 1935, Chapter 372, 49 Stats. 453, 29 U. S. C. A. 160 as amended in 1947, 61 Stats. 136).

Section 10 (e) provides, among other things, that the judgment and decree of the Circuit Court of Appeals shall be final,

> "except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C. Title 28, Sections 346 and 347)."

Cases sustaining jurisdiction are:

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. Ed. 893;

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453, 82 L. Ed. 954;

N. L. R. B. v. Mackay Radio & Telegraph Corp., 304 U. S. 333, 82 L. Ed. 1381.

The date of the judgment and decree to be reviewed is May 17, 1949. [Vol. II, R. 578.] Rehearing was denied June 24, 1949. [Vol. II, R. 578.] Application for this writ has been made within three months after the denial of the petition for rehearing.

Statement of Questions Presented.

1. May Petitioner be ordered to bargain on the issue of union security without provision for an election in compliance with the Labor Management Relations Act, 29 U. S. C. A. 158 (a) (3). (Brief, p. 55.)

2. May an order to bargain with a Union which represents no employees of Petitioner be enforced when the National Labor Relations Board has made no finding that the loss of membership is due to the unlawful conduct of the Petitioner nor that such an order would effectuate the policies of the Act under such circumstances? (Brief, p. 1.)

3. When the Board has not considered the fact that the Union represents no employees of Petitioner, may the Court of Appeals invoke a conclusive legal presumption in order to attain the result which the Court believes the National Labor Relations Board would have reached if it had considered such fact? (Brief, p. 27.)

4. Is a general wage increase granted five months after the strike in an amount not exceeding that negotiated with the Union, a refusal to bargain, when wages had been fully negotiated and the impasse arose with respect to union security alone? (Brief, p. 42.)

5. Did the Court of Appeals improperly refuse to review the findings of the Board and go beyond those findings to devise findings of its own and base its decision thereon? (Brief, p. 31.)

6. In the light of the Union's action in requiring Petitioner to answer its ultimatum as to union security before continuing negotiations and in establishing an arbitrary deadline and then without waiting for the time set, instituting a strike and boycott action against Petitioner, and in flatly refusing to cooperate to modify the War Labor Board order and in refusing to reply to Petitioner's letter setting forth a basis for bargaining, was the Board's order supported by substantial evidence on the record considered as a whole? (Brief, p. 45.)

7. Where no unfair labor practice is found other than refusal to bargain as to union security and grant of a unilateral wage increase, may an order to bargain with respect to rates of pay, wages, hours and other conditions of employment, to take affirmative action and to cease and desist from interfering in any manner with the efforts of the Union to bargain, be enforced without modification? (Brief, p. 54.)

Statement of Grounds for Review.

1. The Court of Appeals has decided important questions of Federal law, contrary to the applicable decisions of this Court, in the following particulars:

A. In holding that there is an established "policy" of the Board to assume that any loss of union membership is the result of unfair labor practices, regardless of any other factors, that this policy should be applied as a matter of law in any and all situations by the Court of Appeals, when the Board itself has not established any such policy and has not considered the applicability of such a policy, if there be one, to the circumstances of this case.

This is contrary to the decisions of this Court in the following cases:

Franks Bros. Company v. National Labor Relations Board, 321 U. S. 702, 88 L. Ed. 1020, 1023-4;

National Labor Relations Board v. Fansteel Metallurgical Corporation, 306 U. S. 240, 83 L. Ed. 627;

National Labor Relations Board v. P. Lorillard Company, 314 U. S. 512, 86 L. Ed. 380;

National Labor Relations Board v. National Licorice Company, 104 F. 2d 655 (C. C. A. 2); modified on other grounds, 309 U. S. 350, 84 L. Ed. 799;

Securities and Exchange Commission v. Chenery Corp., 318 U. 8. 80, 87 L. Ed. 626;

Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 85 L. Ed. 1271;

Jacob Siegel Co. v. Federal Trade Commission, 327 U. S. 608, 85 L. Ed. 1271;

National Labor Relations Board v. Crompton-Highland Mills, Inc., ... U. S. ....., 93 L. Ed. 918;

National Labor Relations Board v. Newport News Company, 308 U. S. 241, 84 L. Ed. 219, 225.

B. In holding that the Board, in making its order in February, 1948, after the National Labor Relations Act had been amended and after the passage of the Administrative Procedure Act, could, nevertheless, apply the rule of the prior Act, that the rules of evidence should not be controlling and that the Board was not bound to weigh and evaluate the evidence and make its decision upon the basis of the "preponderance of the testimony" [R. 573], and without considering the effect of the new legislation.

This is contrary to the recent decision of this Court in

National Labor Relations Board v. Pittsburgh Steamship Company, ... U. S. ....., 93 L. Ed. ....., 17 Law. Week 4523.

C. In holding that the Board's unqualified order to bargain should be enforced without modification, despite the fact that no provision is made for election authorizing bargaining with respect to union security, as required by Labor Management Relations Act, 1947 (18 U. S. C. A. §158 (a) (3)), and in refusing to confine the scope of the order to the acts sought to be prohibited.

This is contrary to the decisions of this Court in

National Labor Relations Board v. Crompton-Highland Mills, Inc., ... U. S. ....., 93 L. Ed. 918;

Jacob Siegel Co. v. Federal Trade Commission (1946), 327 U. S. 608, 90 L. Ed. 888;

Morgan v. United States, 298 U. S. 468, 80 L. Ed. 1288;

National Labor Relations Board v. Fansteel Metallurgical Corporation, 306 U. S. 240, 261, 83 L. Ed. 627, 638;

Phelps-Dodge Corporation v. National Labor Relations Board, 313 U. S. 177, 85 L. Ed. 1271.

D. In holding that a wage increase which was within the limits of that negotiated by the Union and which had been agreed upon with the Union prior to the strike was, nevertheless, an independent refusal to bargain.

This is contrary to the recent holding of this Court in

National Labor Relations Act v. Crompton-Highland Mills, Inc., supra.

E. In holding that there was a refusal to bargain on the issue of union security on a record which indicates as a matter of law that Petitioner bargained in good faith and utilized legitimate bargaining tactics.

This is contrary to the decision in:

National Labor Relations Board v. Sands Manufacturing Company, 306 U. S. 332, 83 L. Ed. 682;

National Labor Relations Board v. P. Lorillard Company, 117 F. 2d 921, 923-5 (C. C. A. 6); modified on other grounds 314 U. S. 512;

National Labor Relations Board v. Express Publishing Company, 128 F. 2d 690 (C. C. A. 5).

2. The decision of the Court of Appeals is in conflict with the decisions of Courts of Appeals of other Circuits in holding that there is an established "policy" of the Board to assume that any loss of union membership is the result of unfair labor practices, regardless of any other factors, that this policy should be applied as a matter of law in any and all situations by the Court of Appeals, when the Board itself has not established any such policy and has not considered the applicability of such a policy, if there be one, to the circumstances of this case.

This is in conflict with the following decisions of Courts of Appeals of other Circuits:

National Labor Relations Board v. Inter-City Advertising Co., 154 F. 2d 244 (C. C. A. 4);

National Labor Relations Board v. Goodyear Tire & Rubber Company, 129 F. 2d 661 (C. C. A. 5);

Stewart Die Casting Corporation v. National Labor Relations Board, 114 F. 2d 849 (C. C. A. 7); cert. den. 213 U. S. 680, 85 L. Ed. 1119;

National Labor Relations Board v. American Manufacturing Company, 106 F. 2d 61 (C. C. A. 2);

National Labor Relations Board v. Maurice Eanet, ... F. 2d ..... (C. A., D. C.); 15 Labor Cases, Par. 64; 740;

National Labor Relations Board v. National Licorice Co., 104 F. 2d 655 (C. C. A. 2); modified on other grounds 309 U. S. 350, 84 L. Ed. 799;

National Labor Relations Board v. Karp Metal Products, Inc., 134 F. 2d 954 (C. C. A. 2).

3. In making findings of fact to support its decree which were not relied upon or found by the Board in framing its order, the Court of Appeals has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

> *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, ... U. S. ....., 93 L. Ed. 918;
>
> *National Labor Relations Board v. Newport News Company*, 308 U. S. 241, 84 L. Ed. 219, 225;
>
> *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 87-88, 87 L. Ed. 626, 633.

Thus, the Court below has interpolated findings that Petitioner failed to bargain in good faith over a seven-year period with the Cosmetic Workers [R. 563-4, 565]; that Petitioner must be adjudged guilty of refusal to bargain with the Teamsters "in the light of the history of its relations with the Cosmetic Workers" [R. 565]; that even the wage increase must be viewed in the light of Respondent's continued attempts to circumvent the effect of the Teamster's certification [R. 571; Findings, R. 20]; that the Panel recommendation constitutes a part of the War Labor Board order (18 W. L. R. 582) and makes it contingent upon the continuing certification of the Cosmetic Workers [R. 565]; that the known and established policy of the Board is to enforce automatically an order to bargain, regardless of delay and despite the

Union's complete loss of membership, in any and all circumstances and even though the Board erroneously assumed that the Union continued to have a majority [R. 110] and did not exercise any discretion.

As stated, the questions presented bear upon the whole field of collective bargaining, administrative action and judicial review. The decision is so unrealistic and so extreme a departure from the decision of this Court and of the various Courts of Appeals with which it cannot be reconciled that it cannot be permitted to stand without immediately posing multitudinous questions encompassing management-union relationship and administrative review.

Some of the numerous decisions of this Court with which the decision of the Circuit Court of Appeals is in conflict have been handed down only very recently. The issues presented are of the greatest importance to every citizen and the public interest demands that this Court exercise its supervisory power, to the end that the principles involved shall remain free from doubt and confusion.

These errors are discussed in detail in Petitioner's supporting brief attached hereto.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Court of Appeals of the United States for the Ninth Circuit, to the end that the proceedings of said Court in this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed; and for such further relief as the nature of the cause may require and the Court may deem proper in the premises.

Dated: July 25, 1949.

Respectfully submitted,

THE ANDREW JERGENS COMPANY,
a Corporation,
By J. STUART NEARY,
Attorney for Petitioner.

GIBSON, DUNN & CRUTCHER,
FRANK MERGENTHALER,
Of Counsel.

I HEREBY CERTIFY that I have examined the foregoing Petition and that, in my opinion, it is well-founded, and that the prayer of the Petitioner should be granted by this Court.

J. STUART NEARY,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1949.
No. .....

THE ANDREW JERGENS COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

(Pages 19 to 57.)

In support of the foregoing Petition for Certiorari, this Brief is submitted.

I.

The Enforcement of an Order to Bargain With a Union No Longer Representing Any Employees of Petitioner Should Not Be Predicated Upon the Invocation by the Court of a Presumption of Law That Petitioner Is Responsible for the Complete Loss of Membership, in the Absence of a Finding by the Board as to Responsibility and the Effect of Intervening Circumstances or That the Remedy Is Appropriate.

In response to the Petitioner's motion to adduce additional evidence, the Board conceded in its brief that "as

of January 1, 1948, the Teamsters did not contain in its membership any employees of respondent, whatsoever." The Court of Appeals recites this admission in its opinion. [R. 567.] Subsequent to the Board's order, that agency modified the appropriate unit, excluding therefrom certain watchmen and supervisory personnel who were no longer within the definition of employees in the Labor Management Relations Act, 1947. In this connection the Board stated:

> "These exclusions *do not affect the union's majority status.*" [R. 110.]

At no time did the Board consider the complete loss of membership as a factor in its decision whether an order should issue and what kind of an order would best effectuate the policies of the Act. Indeed, counsel for the Board contended that such a factor is entirely immaterial, and the Court of Appeals has accepted the argument in full.

The Court below relies upon the rulings of this Court in *Franks Bros. Company v. National Labor Relations Board,* 321 U. S. 702, 88 L. Ed. 1020, and *International Association of Machinists v. National Labor Relations Board,* 311 U. S. 72, 85 L. Ed. 50, which hold that the Board may order an employer to bargain with a union which has lost its majority status subsequent to an unfair labor practice on the theory that the Board may reasonably find that such an order will best remedy the effects of an unfair labor practice and will thereby effectuate the policies of the Act.

Petitioner submits, however, that it was error for the Court of Appeals to enforce the order herein, where the Board exercised no discretion as to the effect of inter-

vening circumstances on the propriety of its order. The decision is in flagrant disregard of the pronouncements of this Court in the following cases:

Franks Bros. Company v. National Labor Relations Board, 321 U. S. 702, 88 L. Ed. 1020;

National Labor Relations Board v. P. Lorillard Company, 314 U. S. 512, 86 L. Ed. 380;

National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L. Ed. 627;

Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80, 87 L. Ed. 626;

Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 85 L. Ed. 1271;

Jacob Siegel Company v. Federal Trade Commission, 327 U. S. 608, 90 L. Ed. 888;

National Labor Relations Board v. Crompton-Highland Mills, Inc., ... U. S. ....., 93 L. Ed. 918.

The decision of the Court of Appeals is in direct conflict with the following opinions from Courts of Appeals of other Circuits:

National Labor Relations Board v. Inter-City Advertising Company, 154 F. 2d 244 (C. C. A. 4);

National Labor Relations Board v. Goodyear Tire & Rubber, 129 F. 2d 661 (C. C. A. 5);

Stewart Die Casting Corp. v. National Labor Relations Board, 114 F. 2d 849 (C. C. A. 7); cert. denied 213 U. S. 680, 85 L. Ed. 1119;

National Labor Relations Board v. American Manufacturing Company, 106 F. 2d 61 (C. C. A. 2);

National Labor Relations Board v. National Licorice Company, 104 F. 2d 655 (C. C. A. 2); modified on other grounds 309 U. S. 350, 84 L. Ed. 799;

National Labor Relations Board v. Maurice Eanet, et al., ... F. 2d ....., 15 Labor Cases, pars. 64, 740 (C. A., D. C.).

Although the following cases are distinguishable, they are relied upon by the Court below in support of its holding. Insofar as they support the holding, they cannot be reconciled with the decisions of this Court and those of other Courts of Appeals just cited.

National Labor Relations Board v. Swift, 162 F. 2d 575 (C. C. A. 3);

National Labor Relations Board v. Norfolk Shipbuilding & Drydock Co., 172 F. 2d 813 (C. C. A. 4);

National Labor Relations Board v. Arnolt Motor Co., 173 F. 2d 597 (C. C. A. 7);

National Labor Relations Board v. Central Dispensary, etc., 145 F. 2d 852 (C. A., D. C.);

National Labor Relations Board v. Highland Park Mfg. Co., 110 F. 2d 632 (C. C. A. 4).

Had the Board taken evidence on this issue and had it been proved that for the past eighteen months the Union has represented no employees of Petitioner, and had the Board then determined upon the basis of the evidence that the loss of membership was, at least in part, the result of the purported unfair labor practice, the rule of the *Franks* case would doubtless support an order to bargain with this particular union. The significance of the decision of the

Court below that the Board *need not consider such a factor or exercise any discretion* whatsoever as to what bearing it may have on the propriety of its remedy, cannot be over-emphasized.

It cannot be gainsaid that an order to bargain with a union in which for eighteen months no employee has been a member, and whose authority to represent the employees is over three and one-half years old, has radically different consequences from an order requiring bargaining with a union whose representative status is unquestioned. It is hardly less apparent that a remedy which is appropriate where the loss of membership was occasioned by an unfair labor practice may be highly inappropriate where such loss is occasioned by independent circumstances unrelated to the conduct, lawful or unlawful, of the employer.

This is not to say that the Board must not deter employers from violating the statutory enactment. But that is not the sole consideration which should influence the Board's exercise of its remedial discretion. The Board must also protect the fundamental right, guaranteed by the statute, of employees to bargain through representatives of their own choosing.

How this administrative agency can perform its remedial function, *without considering the complete lack of any employee support* of the Union with which this Petitioner has been ordered to bargain, has not been explained. Also inexplicable is the disregard of the clear mandate of this Court, which is necessarily to be implied from the *P. Lorillard Company* case and is unmistakably made manifest in *Franks Bros. Company v. National Labor*

Relations Board, 321 U. S. 702, notwithstanding that both cases were relied upon in the opinion of the Court below.

In refusing to distinguish the *P. Lorillard* case from the *Franks* case, this Court, in the latter case, effectively differentiated the case at bar from the cases relied upon by the Court below:

> "That issuance of the order challenged by petitioner lay within the Board's discretion is settled by our holding in National Labor Relations Bd. v. P. Lorillard Co., 314 U. S. 512, 513, 86 L. Ed. 380, 382, 62 S. Ct. 397. The P. Lorillard Co. Case, argues petitioner, is distinguishable because in that case the Court pointed to the fact that, 'The Board had considered the effect of a possible shift of membership. . . .' *Id.* 513. But in this case also the Board considered the change in membership, and in addition relied in part upon the Lorillard decision to support its order. We find no possible valid distinction between this and the P. Lorillard Co. Case.
>
> "Nor is the Lorillard decision inconsistent with the earlier holding in National Labor Relations Bd. v. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L. Ed. 627, 59 S. Ct. 490, 123 A. L. R. 599. In the latter case the Board's order to bargain with the union rested in part on its finding that the company should reinstate ninety-three discharged union members. The Board had not determined in that proceeding, nor did it argue in this Court, that the company should be compelled to bargain with the union if these ninety-three employees were denied reinstatement. After this Court, contrary to the Board's conclusion, held that these employees properly were denied reinstatement, *the situation was the same as if the*

> *Board had not considered the effect of the change in union membership. Cf.* National Labor Relations Bd. v. P. Lorillard Co., *supra.*" (P. 706.) (Emphasis added.)

Similarly, in other connections, this Court has made it clear that an administrative agency must consider every relevant factor bearing on the propriety of its remedy and must exercise and make known to the parties an informed discretion based upon the particular circumstances found to exist.

In *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U. S. 177, the Board concluded that the employer had discriminated against union members in violation of Section 8 (3) of the Act. The employer had contended that some of the employees had obtained "substantially equivalent employment" and that the Board had no power to order reinstatement. The Board found that the employees had not obtained "substantially equivalent employment" but concluded that whether or not they had procured such other employment, the employer should be ordered to reinstate them. This Court upheld the power of the Board to reinstate such personnel, but denied enforcement of the order because the agency had not revealed upon which alternative basis the order had been framed. The confusion which exists among the lower Courts calls for application to this case by this Court of the rule that:

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders

(§10 (e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board." (P. 197.)

In *Jacob Siegel Co. v. Federal Trade Commission,* 327 U. S. 608, it was there held that where it does not appear in the record that the administrative agency had considered alternative remedies which would have cured the evil and, at the same time, would have been less harsh, the judicial function is not to pass upon the propriety of the remedy but is to remand to the Commission which must first exercise an informed judgment:

> "For the Commission seems not to have considered whether in that way the ends of the Act could be satisfied and the trade name at the same time saved. We find no indication that the Commission considered the possibility of such an accommodation. It indicated that prohibition of the use of the name was in the public interest since the cease and desist order prohibited the further use of the name. But we are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate. Yet that is the test, as the Algoma Lumber Co. and the Royal Milling Co. cases indicate. Its application involves the exercise of an informed, expert judgment." (P. 613.)

Just as in those cases, the Court in the instant case seeks to apply a stereotyped legal formula ordering Petitioner to bargain with this Union on the basis of a finding that in January, 1946, the Union was the duly certified representative of the employees.

The Board expressly assumed that at the time of the issuance of its order in 1948, the Union represented a majority of the employees. [R. 110.] No consideration was given to the possibility of a loss of majority and, of course, none to the now admitted fact that there were no employees represented by the Union, nor to the possibility that such loss could have been due solely to the unlawful strike and boycott activities.

The Court below holds that none of these alternatives need be considered at the time when the Board fashions its remedy, despite the rule that the remedy *must apply to the facts as they exist when the order takes effect.*

> *National Labor Relations Board v. Karp Metal Products, Inc.,* 134 F. 2d 954 (C. C. A. 2); (denying enforcement of the Board's order in 51 N. L. R. B. 621 [cited R. 569]).

Not only has the Court below failed to give heed to the holdings of this Court, but it has not perceived the Legislative intent which prompted the revision of Sections 10 (e) and 10 (c) to require "substantial evidence" and a "preponderance of the evidence" to support the conclusions of the Board in lieu of the "expertness" which

had been relied upon by the Board under the original Act to support orders which otherwise would not have been enforced. The statement of the managers of the amended bill on the part of the House of Representatives says, "The language also *precludes the substitution of expertness for evidence* in making decisions." (Emphasis added.) (House Report 510, 80th Congress, pp. 55-6.)

The Board's counsel may seek to support this order purely on the ground that this recipe has worked so well in the past that it will undoubtedly work in any situation notwithstanding how radically the ingredients may differ. But it thwarts the intent of Congress to utilize this "expert" knowledge to fortify an order which was issued without considering any evidence which might lead the Board to the honest conclusion that the policy was not applicable in this case.

Not only is the holding of the Court below contrary to the applicable decisions of this Court, but its opinion accentuates the irreconcilable conflict in the decisions of the lower Courts as to what kind of a finding, if any, is required to support an order to bargain with a Union which no longer represents a majority of the employees.

The Court of Appeals of the Fourth Circuit in the *Inter-City* case holds that the Board must find that the loss of membership was caused by a refusal to bargain on the part of the employer or by some other unremedied unfair labor practice.

The Court of Appeals of the Third Circuit in *National Labor Relations Board v. Swift,* 162 F. 2d 575, apparently agrees with the opinion of Judge Dobie, dissenting in the *Inter-City* case, that if the Board thinks it would best effectuate the policies of the Act, the order to bargain is sufficiently supported by a finding that the loss of membership was caused by the employer's conduct evidencing a refusal to bargain, regardless of whether the conduct itself constituted an unfair labor practice.

The decisions of the Court of Appeals of the District of Columbia, together with those of the Second, Fifth and Seventh Circuits, in the decisions cited *supra,* page 21, consistently require the Board to make a realistic and up-to-date determination of representation as a necessary finding in support of an order to bargain under factual circumstances strikingly similar to that presented by the instant record.

The Court of Appeals for the Ninth Circuit holds in its decision below, first, that the loss of membership need not be occasioned by the unremedied refusal to bargain on the part of the employer; second, that even if such a causal relationship were requisite, a legal presumption that the loss of membership was caused by the refusal to bargain may be invoked by the Court under any and all circumstances; third, that a complete loss of membership in the Union, even if the cause thereof is entirely unrelated to any conduct of the employer has no relevance to the issue of what kind of an order the Board should fashion in

order to best effectuate the policies of the Act; fourth, that, therefore, the Board need exercise no discretion in framing its remedy, even though its remedy was based upon the erroneous assumption that the Union continued to represent a majority of the employees. [R. 567-9.]

In so holding, the Court below has gone far beyond any reported decision and has mirrored more clearly than any argument the confusion which exists in the lower Federal Courts on these fundamental questions of administrative law.

It is submitted that a review of this holding by this Court is essential, in order that the applicability of the doctrine of the *P. Lorillard, Phelps Dodge,* and other cases relied upon by Petitioner, to the circumstances presented by the record herein, may be clarified. Otherwise, the Board may assume that it is warranted in stereotyping a remedy to punish employers who have refused to bargain, without regard to the effect of such a remedy on the rights of employees to bargain through representatives of their own choosing, and as in this case, to insist that its possible effect on such rights need not enter into their judgment processes.

II.

The Court Failed to Determine the Applicability of the Amendments of the Labor Management Relations Act of 1947 and Invaded the Exclusive Province of the Board by Making Independent Findings of Its Own, in Considering Facts Beyond the Record, and Supporting the Decree of Enforcement on Grounds Not Considered by the Board.

A. The Court Refused to Determine the Applicability of the Amendments of the Labor Management Relations Act of 1947 and the Effect of Such Amendments on the Scope of the Court's Review of the Board's Order.

Prior to the Board's decision, the far-reaching amendments affecting the rules of evidence and scope of judicial review of the Labor Management Relations Act of 1947 became effective. Section 10 (c) of the Act now provides that the Board's findings must be supported by "substantial evidence on the record considered as a whole." (29 U. S. C. A. 160 (e).) Prior to the amendment the Act simply required that the findings be supported by evidence.

The amendments also provide in Section 10 (c) a new requirement that the Board must find in accordance with the "preponderance" of the testimony.

One instance in which the Board did not find in accordance with the preponderance of the testimony, and of the fact that the Court of Appeals did not consider whether the findings were supported by substantial evidence "on the record considered as a whole," is the finding that

Petitioner's representatives said they had no authority to *negotiate* with respect to union security. [R. 36.] This finding is based solely on the testimony of John Stevenson [R. 288] which is in direct conflict with the testimony of every other witness in the case, including the testimony of the Union's business representative, Davis, and in conflict with the actual facts disclosed by the record itself that union security was, in fact, negotiated. [R. 25-39.]

Another example of the Court's failure to determine the applicability of the Labor Management Relations Act is the reference in the Court's decision [R. 565] to "substantial evidence" and not substantial evidence "on the record considered as a whole."

The fact that the Court refused to decide the applicability of the amendments is revealed in its decision [R. 573] wherein the Court stated that while Petitioner had made various objections to the admission of evidence, Section 10 (b) of the Act, as it provided at the time of the hearing, made inapplicable the strict rules of evidence, but that the rulings made on evidence would have been correct even if the rules of evidence were applicable. At the time of the Board's decision the 1947 amendments had made the rules of evidence applicable, and the portion of the decision referred to shows that the Court did not consider whether the old Act or the amended Act was controlling.

This Court recently reviewed another instance in which the Court of Appeals refused to decide this question and remanded the case to the Court of Appeals for a decision on the applicability of those rules. *Pittsburgh Steamship*

Company v. National Labor Relations Board, ... U. S. ....., ... L. Ed. ....., 17 L. W. 4523. This Court stated:

> "Without doubting the existence here of evidence substantial enough under the Wagner Act, Consolidated Edison Co. v. Labor Board, 305 U. S. 197, 229, to warrant the Board's findings, we are not certain whether that standard controls this case. For questions have arisen whether the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §1001 *et seq.*, and the Taft-Hartley Act, 71 Stat. 136, 29 U. S. C. Supp. I, §141 *et seq.*, enacted between issuance of the Board's order and the Court of Appeals' decision, are applicable to and if applicable in any way affect Board procedures and the scope of judicial review of Board orders. The applicability and possible effect of either or both of these statutes apparently were not dealt with by the Court of Appeals, which neither discussed the statutes nor cited cases discussing them; the statutes and their impact have not been briefed with any elaboration before this Court. These questions should be considered in the first instance by the Court of Appeals." (17 Law Week 4524, decided June 20, 1949.)

It is apparent from the decision of this Court in *Pittsburgh Steamship Company v. National Labor Relations Board, supra,* that the scope of review with respect to "substantial" evidence on the record "as a whole" may impose an entirely different requirement than that imposed by the "evidence" requirements of the original Wagner Act. The same, of course, is even more clearly true in the case of the requirement of the amended Act that the Board decide in accordance with the "preponderance" of the testimony.

The effect and applicability of these provisions the Court of Appeals did not decide, despite the fact that Petitioner urged upon the Court of Appeals that those amendments were applicable and that the findings of the Board were insufficient when put to such standard.

B. The Court of Appeals Has Exceeded Its Function of Judicial Review by Making Independent Findings of Its Own, by Considering Facts Beyond the Record, and by Supporting the Decree of Enforcement on Grounds Which Were Not Considered by the Board, Thereby Invading the Province Left by Congress for the Exclusive Jurisdiction of the Board.

In its decision the Court of Appeals in at least six different instances has invaded the province of the Board, and exceeded its own function, by making independent findings of fact of its own, by considering "facts" not appearing of record but which the Court probably acquired from statements in the Board's brief, and in attempting to justify the Board's order on grounds and legal theories which the Board itself did not use to justify its order. The Court, therefore, has not confined itself to reviewing the sufficiency of the Board's findings and conclusions, but has added to those findings and conclusions in clear usurpation of the function of the Board and in violation of the intent of the Act.

The Board's findings appear in the record at pages 21-54, 103-110.

One of the instances in which the Court assumes facts which are not in the record, but which are material to its decision, are the references to the Soap and Cosmetic Workers' Union. The entire 16 lines contained in the

paragraph beginning at R. 563 are not contained any where in the record and certainly were not in the findings of the Board. Yet the "history" there related of Petitioner's relations with the Soap and Cosmetic Workers' Union is a finding which the Court considers material as is evidenced by the Court's statement that Petitioner was "stalling . . . *especially in the light of the history of its relations with the Cosmetic Workers.*" [R. 565.] (Italics added.) The Court found that Petitioner's "history" with respect to the Cosmetic Workers was one of dereliction, a finding which even the Board did not make. It is interesting here to note that the original complaint contained a paragraph dealing with the relations of Petitioner and the Soap and Cosmetic Workers, which was *stricken on motion of Petitioner.* [Findings, R. 20.]

Again, the Court went beyond the record in its assumption of "Respondent's continued attempts to circumvent the effect of the Teamsters' certification" [R. 571], which the Court states furnishes additional evidence of Petitioner's bad faith. While this may be an inadvertent statement on the part of the Court, it is a finding authored entirely by the Court, and there is no evidence in the record whatsoever relating to any "continued" attempt to circumvent the Teamsters' certification. The Board made no finding whatsoever, nor is there any fact in the record, with respect to such conduct on Petitioner's part.

While it is clear without citation of authority that the Court, or for that matter even a trier of fact, may not consider facts outside the record, this Court has expressly stated that such practices are condemned by Section 10 (e) of the Act.

In *National Labor Relations Board v. Newport News Company,* 308 U. S. 241, 249-50, 84 L. Ed. 219, 225, the Court of Appeals had considered the "facts" brought to its attention in a brief, which is evidently the source of the lower Court's "findings" in the instant case. In holding this to be error, the Court stated:

> "The court below, in its opinion, states it was advised in a brief after the hearing in that court, that the plan had been amended by striking out the provisions in question. It concludes, therefore, that their previous existence is immaterial. The statute expressly deprives the reviewing court of power to consider facts thus brought to its attention. The case must be heard on the record as certified by the Board. The appropriate procedure to add facts to the record as certified is prescribed in §10 (e) of the Act."

In other instances the Court of Appeals not only considered matters outside the record, but made findings of its own independent of any findings of the Board.

At R. 565 the Court's decision stated that Petitioner's delay in sending the letter of February 15, 1946, may be attributed to "stalling tactics" by the Petitioner. The Court uses this finding that Petitioner "stalled" to support the Board's conclusion that Petitioner had violated Section 8 (5) of the Act in not bargaining in good faith. But the Board did *not* make a finding that Petitioner's delay with reference to the letter was unreasonable or that such

delay amounted to "stalling tactics" which was evidence of bad faith. In this instance, therefore, the Court of Appeals has clearly inserted findings of its own, and drawn its own inferences and conclusions from the evidence and Petitioner's conduct, a function clearly left solely to the Board. Furthermore, the Court uses this finding of its own to support the Board's conclusions.

Even as a matter of law, the Court could not state that Petitioner's conduct constituted "stalling" because the Board itself has never held that a delay for any period in and of itself constituted "stalling" and evidence of bad faith. For example, in *Norwood Sash and Door Manufacturing Company,* 42 N. L. R. B. 678, the Board held that the employer's delay of two months so that it might be advised by its labor relations counsel did not amount to "stalling" and was not unreasonable even though the employer had no serious question upon which it needed advice.

In the Matter of Out-West Broadcasting Company, 40 N. L. R. B. 1367, the Board held that a period of five months' delay, during which time the employer cancelled meeting after meeting, was not "stalling tactics" and that the employer's delay of two months in submitting promised counter-proposals was justified under the circumstances.

A similar holding by the Board is *Matter of American Laundry Machine Company,* 76 N. L. R. B. 981.

Since the Court has made a finding which the Board itself did not make, and since it clearly appears at R. 565,

571, that the Court used the finding to support the Board's order, it cannot be stated that the Court without such interpolated findings, would have enforced the Board's order.

The Court of Appeals has further departed from the findings and conclusions of the Board in its consideration of the unilateral wage increase, which the Court of Appeals justifies as an unfair labor practice on the theory that since the strike involved was an unfair labor practice strike, such unilateral action constituted a violation of Section 8 (5) of the Act. [R. 571.] The Board, however, found that the wage increase was an *"independent"* unfair practice. [R. 110.] The Board stated this as a conclusion, without revealing its basis for such determination or justifying it in any way.

The Court of Appeals has itself suggested a ground upon which to justify that conclusion, but it cannot be said that this was the ground upon which the Board based its conclusion. It would seem not to be the ground of the Board's conclusion, inasmuch as the Board states that the wage increase was an *"independent"* refusal to bargain. [R. 110.]

In *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U. S. 177, 85 L. Ed. 1271, this Court held that it is necessary for the Board to reveal the basis of its order, see quotation of this case, *supra,* pp. 25-26.

The Board's conclusion with respect to the unilateral wage increase, therefore, would not seem to be sufficiently

supported since the Board does no more than conclude that such unilateral action was an unfair labor practice. However, it is for the Board to supply the basis of such conclusion and not the Court of Appeals.

Other instances in which the Court of Appeals has made findings of its own are its statements, with respect to the War Labor Board order, to the effect that Petitioner gave little weight to the force and effect of such order [R. 566], and in supporting the Board's finding that Petitioner was not justified in discussing the War Labor Board order by finding that such order was inapplicable by its own terms [R. 565], while the Board had held that such order was a nullity and devoid of legal effect as it carried no punitive provision. [R. 43-44.]

Probably the most extreme instance in which the Court of Appeals has itself devised grounds to support the Board's order is the rule laid down by the Court of Appeals that it is to be assumed as a matter of law that the loss of majority by the Teamsters in this case was due to Petitioner's conduct. In short, the Court of Appeals has devised a conclusive *legal presumption* to take the place of a finding by the Board. Whether the Board would apply such presumption is not here material, but in any event if such presumption is to be used as a ground to support the order, it is for the Board to apply it and not the Court.

The opinion of this Court in *National Labor Relations Boord v. Newport News Company, supra,* page 36, suffi-

ciently supports Petitioner's contention here that the Court of Appeals went beyond the record and that such conduct is erroneous.

This Court has also announced the principles which the Court of Appeals has violated in making findings of its own and in presenting grounds to support the order which the Board itself did not consider.

In *Securities Exchange Commission v. Chenery Corporation,* 318 U. S. 80, 87-88, 87 L. Ed. 626, 633, this Court stated:

> "Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.
> * * *
>
> "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

These cases and the *Siegel* and *Phelps Dodge* cases discussed *supra* (pp. 25-26) are conclusive that the order of the Board in this case is not supported by sufficient find-

ings, either with respect to the conclusion that Petitioner has committed an unfair labor practice, or as to the effect of complete loss of membership in the Union with which Petitioner is ordered to bargain. These cases likewise are conclusive that the action of the Court of Appeals in making findings of its own and supplying grounds to support the Board's decision, has exceeded the function of judicial review. The importance of the questions raised by such procedure is self-evident. Indeed, such questions go to the very root of the principles of division of authority between administrative and judicial bodies, and involve essential problems with respect to the requisites of fair hearing, due process and judicial review.

III.

The Findings of the Board Are Insufficient to Support Its Conclusions That Petitioner Was Guilty of Unfair Labor Practices, and No Review Has Been Afforded Petitioner of the Sufficiency of the Findings to Support the Decision.

There are no sufficient findings to support the Board's conclusion with respect to the unilateral wage increase; its holding that the Union's arbitrary action did not affect Petitioner's duty under the Act; and its rejection of Petitioner's position with respect to the War Labor Board order as being put forth in bad faith. The review afforded by the Court of Appeals was not confined to considering the sufficiency of the findings of the Board to support the order, but, on the contrary, as has been set forth above, the Court of Appeals interpolated findings of its own which it added to those of the Board to sustain the order.

A. The Conclusion That the Wage Increase of July, 1946, Was an Unfair Labor Practice Is Not Supported by Any Finding of the Board and Is Contrary to the Decisions of This Court.

During the course of the strike, Petitioner granted a 15¢ general wage increase. [R. 38-39.] At the time of giving the increase, the Teamsters' Union was not consulted with respect thereto. The Board, therefore, concluded, without in any way revealing the basis of such conclusion, that this increase constituted an independent refusal to bargain. [R. 110.]

As was held by this Court in *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U. S. 177, 85 L.

Ed. 1271 (see quotation, *supra,* pp. 25-26), the Board in making its orders must disclose the basis upon which it reached its conclusions. This the Board clearly did not do. The Court of Appeals supplied the basis for such conclusion with respect to the wage increase by announcing the principle that while the employer may unilaterally grant a wage increase after an impasse in negotiations is reached, such right is only afforded the employer where the Union is guilty of having broken off negotiations. [R. 571.]

The record is clear, and, in fact, it is admitted by the Board, that the parties had negotiated with respect to wages and were in complete agreement with respect thereto. The Board's brief filed in the Court of Appeals stated (p. 25) that it was admitted that "the Teamsters and the Respondent reached substantial agreement on all issues except that of union security." The Union stated that whatever increase was put into effect on a national scale would be satisfactory. [Findings, R. 26, 30, 36, 105, 109; Decision, R. 570.]

No agreement could be reached with respect to when the wage increase could be put into effect and the Union summarily broke off negotiations before that subject could be completed. [R. 36, 105-106.]

The Board's decision states that the increase constituted an *independent* refusal to bargain. [R. 110.] The Court of Appeals held that the increase constituted a refusal to bargain upon the basis that Petitioner was guilty of a refusal to bargain on the *union security* provision on January 17, 1946. [R. 571.]

With respect to wages, there is no denial that Petitioner bargained in good faith. Further, there is no

denial that the Teamsters would not consider the exact terms of the wage increase or when it would be put into effect or execute any agreement with respect thereto. Further, the increase granted in July, 1946, was in an amount within the limits of that discussed previously on January 16, 1946, with the Teamsters. [R. 30.]

Inasmuch as the Board found the increase to be an "independent" refusal to bargain, the basis set forth by the Court, even if correct, would not support its order. However, in view of the recent decision of this Court in *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, 93 L. Ed. 918, the ruling of the Court of Appeals is clearly erroneous. In that case the unilateral wage increase was held by this Court to be improperly granted inasmuch as it exceeded the wage increase which previously had been negotiated with the Union. The decision of this Court specifically differentiates the present case and recognizes that the increase given here was not a refusal to bargain (p. 922):

> *"We do not here have a unilateral grant of an increase in pay made by an employer after the same proposal has been made by the employer in the course of collective bargaining but has been left unaccepted or even rejected in those negotiations.* Such a grant might well carry no disparagement of the collective bargaining proceedings. Instead of being regarded as an unfair labor practice, it might be welcomed by the bargaining representative, without prejudice to the rest of the negotiations." (Emphasis added.)

No reason is perceived why the wage increase granted in the instant case could carry any disparagement of the collective bargaining proceedings, nor can it be perceived

how such an increase would not be welcomed by the bargaining representative without prejudice to the rest of the negotiation inasmuch as the Union had already agreed upon the wage increase and had only refused to execute a contract with reference thereto.

The decision of this Court in *National Labor Relations Board v. Crompton-Highland Mills, Inc., supra,* has set forth that a unilateral increase under the circumstances of the present case was not a refusal to bargain. In this case wages had been negotiated in good faith with the Teamsters; there was virtual agreement on wages and an impasse was reached on another point which had the collateral effect of preventing the execution of the contract with respect to wages; and the increase granted was within the limits negotiated. The decision of the Court below cannot be reconciled with the rules announced by this Court in the *Crompton-Highland Mills, Inc.* case.

B. The Union Was Guilty of Arbitrary Action of Such Nature That It Cannot Be Said That Petitioner Has Failed in Its Duty.

The Board finds that "the Teamsters were insistent on some form of security" [R. 36, 105], and the Circuit Court states, "The Teamsters were particularly anxious to obtain some union security provision in the contract." [R. 562.]

The Board's brief states: "There was nothing of substance left to negotiate except union security. . . . *The Teamsters were unwilling to sign an agreement without a union security clause.*" (P. 29.)

Admittedly, the Union, instead of electing to negotiate a contract, took an arbitrary position and pinned every-

thing on union security. At no time did the Union ever offer to discuss whether a contract would be entered into *upon terms other than union security.* The record and findings are directly to the contrary and the decision of the Court is to the contrary. The Union would not discuss a contract without union security. The union security demand was the ultimatum with which negotiations began and with which they concluded. The Union entered into the negotiations, imposed this ultimatum, and then placed an arbitrary deadline for a reply, and anticipating this deadline, put into effect a strike and boycott to destroy Petitioner's business.

Petitioner did not have to accept the Union's demand that the parties agree on union security first, but Petitioner did attempt to negotiate this issue. A glance at the Report [R. 24 to 39] shows that *every* witness testified that union security was discussed to the subordination of all other clauses in the contract.

The Court, in holding that under this set of facts found by the Board itself Petitioner has been guilty of refusal to bargain, puts a premium upon arbitrary and irresponsible Union conduct and leadership.

Three pages of the opinion of the Circuit Court [R. 562-5] are devoted to a discussion of the letter written by Respondent's attorney on Friday, February 15th, and received by the Union *after* it had put its strike and boycott into effect, in an all-out effort to ruin Petitioner.

This precipitate strike action cannot be justified by the wording of the letter of February 15th which was still in the mails. It was the Union that terminated negotiations by its suddenly instituted coercive measures. The Union

ignored the letter upon the ground that the Petitioner's position as to the War Labor Board order was an "impossible situation" and that there would be no further negotiations. [R. 326, 334-5, 346, 348.]

It is significant that the Court has not found *when* the refusal to bargain occurred, nor could the Board find this assumed fact. It is inconceivable that any one present at the meeting of January 17th could have considered that Petitioner's representatives refused to bargain on that date. If there was no refusal on January 17th, when did such refusal occur? Certainly not by the terms of a letter received by the Union after it had taken its irretrievable step to terminate negotiations and entered upon its all-out campaign to put Petitioner out of business.

This holding of the Court of Appeals is, furthermore, in conflict with the decision of the Fifth Circuit in *National Labor Relations Board v. Express Publishing Company,* 128 F. 2d 690, the second headnote of which case states:

> "Evidence failed to establish that newspaper publisher was in 'contempt' as refusing to comply with order of Circuit Court of Appeals enforcing order of National Labor Relations Board, which directed publisher to cease and desist from refusing to bargain collectively with guild as exclusive representative of editorial employees, where it appeared that negotiations were broken off abruptly by guild with intention of compelling acceptance of its proposed contract by coercion."

As stated in *National Labor Relations Board v. P. Lorillard Co.* 117 2d 921, 923-5 (C. C. A. 6), modified on other grounds 314 U. S. 512, 86 L. Ed. 380:

> "The Board is not authorized, by statute or court decision, to shape or control the course of the negotiations * * * so long as the employer bargains collectively, in accordance with the statute." (p. 923), * * *
>
> "But if the employer is free to contract or to refuse to contract at will, he is likewise free frankly to state the terms upon which he may yield and those upon which he will not yield." (p. 924), * * *
>
> "The sincerity of the employer's effort in negotiating with a labor organization, under the statute, is to be tested by the length of time involved in the negotiations and the persistence with which the employer offers opportunity for agreement." (p. 924).

In *National Labor Relations Board v. Sands Mfg. Co.*, 306 U. S. 332, 83 L. Ed. 682, the Union Committee in a meeting with the Company on August 21, was "adamant" that the Company could close its entire plant if it chose, but could not operate the machine shop in accordance with its interpretation of the contract. On the next day the factory was closed. The Board found that the Company was under obligation to send for the Committee and "again reason with its members" or postpone closing the plant. This Court held:

> "We think it was under no obligation to do any of these things. There is no suggestion that there was a refusal to bargain on August 21st. There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefor by the employees." * * *

"As the respondent had lawfully secured others to fill the places of the former employees and recognized a new union, which, so far as appears, represented a majority of its employees, the old union and its shop committee were no longer in a position on September 4th to demand collective bargaining on behalf of the company's employees." 306 U. S. 343-344.

In this case, as in those cited, the Union and employer could not reach agreement on a contract term and the Union attempted, as is the case here, to coerce the employer into the agreement by summarily breaking off negotiations and instituting strike activity of a serious nature.

The Board found that the cause of disagreement between Union and Petitioner was the effect to be attributed to the War Labor Board order, yet the Board *expressly refused to find whether the Union had refused to cooperate* with Petitioner in clarifying the effect of the order. [R. 108.] This is tantamount to a holding by the Board that arbitrary action by a Union is not relevant in judging the conduct of the employer affected by such action.

C. The Board and the Court Have Refused to Consider Petitioner's Position With Respect to the War Labor Board Order, and the Finding That the Position of Petitioner With Respect to That Order Was Taken in Bad Faith Does Not Have the Support of a Preponderance, or Any, of the Evidence.

Petitioner's position with respect to the effect of the War Labor Board order has not had any real consideration by the Board or the Court of Appeals as both tribunals have summarily dismissed Petitioner's position

with respect thereto as being obviously and palpably unreasonable and in bad faith.

The fact was that the War Labor Board (18 W. L. R. 582) had issued an order that Petitioner grant the Soap and Cosmetic Workers' Union a 5¢ retroactive increase and a maintenance of membership clause. That order provided that Petitioner was not to grant either without granting both.

The employees, the Teamsters, and the Petitioner in January, 1946, desired this 5¢ retroactive increase to be paid and there was no controversy thereon. The further increase which was there virtually agreed upon in January, 1946, was an increase applicable to the future only and somewhere in the region of 15¢ per hour. It should also be pointed out that this 15¢ wage increase was eventually put into effect in July, 1946, by Petitioner, and this increase was authorized by a general order granting general authority for increases of approximately 18¢ per hour. See:

> I Labor Arbitration Reports CXL; II Labor Arbitration Reports XXIX.

In view of the provisions of the War Labor Board order which made its two directives mutually dependent upon each other, Petitioner was in doubt as to its position if it granted either the 5¢ retroactive increase alone or if it granted a union security provision to any one other than the Soap and Cosmetic Workers' Union. It was feared that if the union security provision was granted to the Teamsters, which, of course, would preclude a granting of any such clause to another union, that Petitioner would not thereafter be able to give the 5¢ retroactive increase which was desired by all parties.

Executive Order 9250, Title III, Section 4 (7 F. R. 7871) provides that:

> "Any wage or salary payment made in contravention thereof shall be disregarded by the Executive Departments and other governmental agencies in determining the cost of expenses of any employer for the purpose of any law or regulation * * *"

The effect of the quoted provision was to exclude such wage payments from being considered as an item of cost under the Emergency Price Control Act and for the purpose of calculating deductions under the revenue laws of the United States and also for the purpose of determining cost under any government contract. It was not until November 12, 1946, by Executive Order 9801 (11 F. R. 13435) that controls over wages and salaries under the Wage Stabilization Act of 1942 were removed.

It is not unreasonable in the face of such penalties to insist on strict observance of such an order where there is any slight doubt whatsoever as to its effect.

The question here, and the question before the Board and the Court of Appeals, is not, and was not, the legal effect of the War Labor Board order. The position taken by Petitioner was that it was in some doubt as to the effect of the order, and that in view of the penalties attached to it, it would be unable to take any action which might in any way constitute a breach of the order.

The Court of Appeals in its decision goes to some length to set out that the War Labor Board order was not effective in January of 1946. By incorporating the Panel Report into the War Labor Board's decision which that Board did not do, it reaches the conclusion that the Board's order was self-dissolving [R. 565.] That was

a ground upon which the Board did not base its decision, and it was a disposition which was not responsive to Petitioner's position. In January of 1946 there was no directive or decision determining the effectiveness of the War Labor Board order. See the decision of this Court discussing the penalties of such order in *Algoma Plywood & Veneer Company v. Wisconsin E. R. B.* (March, 1949), 93 L. Ed. 541, 551.

Petitioner repeatedly urged upon the Teamsters that since all parties were agreeable to the 5¢ retroactive increase, they should jointly petition for a modification of the War Labor Board order to permit the granting of the 5¢ retroactive increase without the condition inserted in that order of giving a maintenance of membership clause to the Soap and Cosmetic Workers. The position of the Union with respect to such request of Petitioner was that it considered the War Labor Board order a nullity and would have nothing to do with it. [R. 28.]

Stevenson testified on behalf of the Teamsters that he had offered to join with the Petitioner to "clarify the atmosphere with respect to the War Labor Board order". [R. 106.] There was then a conflict in the testimony as to the diligence of both the Teamsters and the Petitioner in seeking a clarification of the effect of the War Labor Board order.

The Board clearly states in its decision that Petitioner in advancing the War Labor Board order was not bargaining in good faith. Yet, the Board in so finding, did not consider the testimony to the effect that Petitioner had repeatedly urged the Union to join with it in clarifying the effect of the order, nor did the Board resolve the conflict as to whether the Union was ever willing to join

in an application for clarification. In fact, footnote "6" of the Board's decision states that since the War Labor Board order was not a legal bar, "It is, therefore, *unnecessary to resolve the evidentiary conflict as to whether or not the Union failed to seek withdrawal of the directive order in question.*" [R. 108.]

We have, therefore, a case in which the Petitioner put forth its doubt with respect to the effect of the War Labor Board order as precluding it from being able to make a union security contract with the Teamsters, and which the Board found to be put forth in bad faith. Yet, by the express admission of the Board, the Board made such finding without considering whether the Petitioner unsuccessfully attempted, as Petitioner earnestly urged, to have the Union join with it in clarifying the effect of the order. It is impossible to understand how the Board could reasonably find Petitioner was in bad faith while refusing to consider such evidence. It was, of course, the uniform practice of the War Labor Board to require joint applications on such matters.

The letter which Petitioner sent the Teamsters on February 15, 1946, is implicit to the effect that Petitioner was willing to seek clarification of the order if the Union would join with it. This letter stated:

> "The Company finds itself unable to come to a decision upon this point [union security] until the above mentioned order of the War Labor Board is revoked or disposed of in some other manner so as not to cause the Company embarrassment in the future."

IV.

The Instant Order Should Be Denied Enforcement Unless Modified to Conform With the Findings of the Board and Unless Qualified by the Provisions of Section 8 (a) (3) of the Labor Management Relations Act of 1947.

Neither the Board nor the Court below has contended that the evidence adduced at the hearing affords the basis for an inference that Petitioner has shown a lack of good faith or a lack of consistency with the principle of collective bargaining, except for refusing to agree or discuss a union security clause and, later, granting a unilateral wage increase. [R 36, 562.] Yet the order which the Court of Appeals would enforce requires Petitioner to bargain with the Union with respect to rates of pay, wages, hours of employment and other conditions of employment; to post notices that it will comply with such requirements; and to cease and desist from interfering in any manner with the efforts of the Union to bargain collectively with it.

This Court has repeatedly and recently held that an order of such breadth may not be enforced under such circumstances.

> *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, ... U. S. ....., 93 L. Ed. 918;
>
> *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 85 L. Ed. 930.

Furthermore, the unqualified order to bargain with respect to union security ignores the statutory provisions of the Act as amended,* requiring an election authorizing the Union to negotiate on that subject before the employer has any obligation to consider it as an appropriate topic for collective bargaining. Particularly in view of the admitted fact that the Union represents no employees of Petitioner, it is futile to protest, as does the Court below in accord with the counsel for the Board [R. 566], that such was the intent of the Board when the order was issued, more than eight months after Section 8 (a) (3) was modified, and the order has been allowed to stand without modification over Petitioner's objection. Obviously, if the Board has a particular intent or reservation or condition in mind, it should make such reservation or condition in express terms so that Petitioner will be protected and the rights and obligations of the parties may be enforced in accordance with law.

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*"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act (§§141 to 197 of this title), or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act (this subsection) as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) (§159(a) of this title), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9(e) (§159(e) of this title) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement." 29 U. S. C. A. 158(a)(3).

Conclusion.

The enormity of the error of the decision of the Court of Appeals arises from the fact that the original Board's charge was utterly baseless, the Board's decision completely untenable. It could not be supported in the Court of Appeals without disregarding the requirements of statute and the principles of due process and the proper functions of judicial review.

The decision below is such a radical departure from all prior decisions and such a drastic advance beyond even the contentions of the Board itself in the many particulars noted as to call for the exercise of the supervisory power of this Court. The decision erases all established landmarks of good faith collective bargaining, administrative procedure and judicial review. It is impossible to overstate the serious and far-reaching consequences of such a decision if permitted to stand. The Court has abdicated its reviewing function in accepting without question the finding of the Board and its rulings and has exceeded that function in manufacturing findings of its own to supplement the findings of the Board. It has obviously misinterpreted controlling decisions of this Court, and disregarded and failed to notice other recent controlling decisions covering all issues presented, and has equally disregarded the statutory requirements. The decision constitutes nothing short of judicial legislation.

For the reasons herein set forth, Petitioner submits that the decision of the Court of Appeals is not only in

conflict with the prior decisions of this Court and of other Courts of Appeal and with the overwhelming weight of authority, but that the questions involved are of the greatest national importance and should be settled by decision of this Court.

Dated: July 27, 1949.

Respectfully submitted,

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